Tenaga Nasional Bhd v Malaysian Resources Corp Bhd and other applications

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NOS WA-24C-183–09 OF 2022, WA-24C-184–09 OF 2022 AND WA-24C-186–09 OF 2022
ALIZA SULAIMAN J
29 MARCH 2024

Construction Law — Adjudication — adjudication decision — Respondent's application to set aside and stay adjudication decision and claimant's application to enforce adjudication decision — Whether adjudication decision was null and void because adjudicator lacked absolute jurisdiction — Whether adjudicator acted in excess of jurisdiction — Whether adjudicator proceeded on frolic of his own — Whether adjudicator failed to provide any reason/justification — Whether adjudicator failed to consider evidence/arguments raised — Construction Industry Payment and Adjudication Act 2012 ss 15, 16, 25 & 28

Three applications were heard together, ie by: (a) Tenaga Nasional Bhd ('TNB') pursuant to s 15(b) and/or (d) of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') in OS 183 to set aside the adjudication decision ('AD') ('the setting aside application'); (b) TNB pursuant to s 16 of the CIPAA in OS 184 to stay the AD pending the disposal of the application to stay the AD, the setting aside application and/or the final determination of the subject matter of the AD by way of arbitration ('the stay application'); and (c) Malaysian Resources Corp Bhd ('MRCB') pursuant to s 28 of the CIPAA in OS 186 to enforce the AD ('the enforcement application'). The adjudication proceedings arose from a letter of acceptance wherein MRCB was appointed by TNB as the main contractor for a project. The works were practically completed, and the final account was issued by TNB in the sum of RM43,919,533, not inclusive of goods and services tax. MRCB disputed the final account and issued a notice to dispute pursuant to cl 30.10(b) of the conditions of contract ('COC') within the stipulated time of three months from the date of receipt of the final account. MRCB submitted its interim payment application to TNB for the sum of RM47,442,296.87. TNB then issued the certificate of payment, which was later revised, to reflect the figures as certified in the final account. MRCB was informed that the consultants for the project had decided to maintain their decision regarding the final account. MRCB then issued the notice and request for arbitration to TNB. MRCB issued a payment claim to TNB to claim the sum of RM1,519,037.10 (not inclusive of interest) for: (i) under-certification of the variation works that had been completed pursuant to 25 project management instructions ('PMI'); and (ii) erroneous omission on the variation works for

PMI 054 in the sum of RM211,971.22. TNB served its payment response on MRCB and MRCB served the notice of adjudication to TNB. MRCB then submitted its adjudication claim and thereafter, TNB submitted its adjudication responses. TNB subsequently submitted its rejoinder and in reply to the same, MRCB submitted its surrejoinder. The adjudicator determined in the AD that TNB to pay MRCB the sum of RM91,072.63. Hence, these applications.

Held, dismissing the setting aside application and the stay application; and allowing the enforcement application:

(1) The adjudicator dedicated Part N in the AD on 'Jurisdictional Challenges' by quoting TNB's preliminary objections to the adjudication claim and MRCB's response before stating that he was proceeding under s 27(3) of the CIPAA to complete the adjudication process. TNB had not established the first ground in its attempt to set aside the AD (see paras 23–24).

(2) A perusal of the payment claim, including the 'particulars of claim', revealed that sufficient information and details were provided to enable TNB to know MRCB's cause of action as these contained the basis of the claims, the breakdown of the claimed amount, the due date of payment and the relevant contract provisions. TNB was sufficiently appraised of MRCB's case. As MRCB had complied with the necessary requirements under s 5(2) of the CIPAA, the adjudicator was clothed with the necessary jurisdiction to decide on the grounds of claim as advanced by MRCB in the adjudication proceedings (see paras 28–30).

(3) Whilst it was true that, in the adjudication, MRCB took the position that it was entitled to the higher amounts of RM231,584 in relation to PMI 077, RM102,318.75 in relation to PMI 107 and RM20,022.80 in relation to PMI 129 as derived from specific rates and quantities and circumstances as put forth by MRCB in its costs proposals, the adjudicator had considered the parties' submissions and documentary evidence before he decided to rely on the recommended valuation instead of the final account in arriving at the adjudicated amount. TNB's criticism was to the adjudicator's method in arriving at his findings and conclusion which was not tantamount to a denial of the right to be heard or to procedural fairness. Even if the adjudicator adopted a wrong approach by not, among others, assessing whether MRCB's proposed rates and justifications were reasonable, this did not warrant a setting aside of the AD under s 15(b) of the CIPAA. TNB had failed to establish that the adjudicator went on a frolic of his own and acted in breach of the rules of natural justice in deciding MRCB's claims in respect of PMI 077, PMI 107 and PMI 129 (see paras 39, 45 & 47–48).

(4) The adjudicator had referred to, among others, the provisions in the COC, the PMIs, MRCB's notices to claim, spreadsheet and original and revised cost proposals; minutes of meetings; correspondence; the recommended valuation and the final account in assessing the parties' respective positions and arriving at his decision. There was adequate reasoning to show the adjudicator's thought process when he finally awarded MRCB's claims for PMI 077, PMI 107 and PMI 129 (see paras 50–51).

(5) Section 25 of the CIPAA granted wide powers to an adjudicator, one of which in para (d) was to draw on his own knowledge and expertise of the construction industry. The issuance of an non-conformance report or any form of documentation for works that do not meet the specifications was a trite practice in the construction industry. It was well within the adjudicator's powers to consider this practice and he should not be faulted as having acted on a frolic of his own. The parties were given ample opportunities to make submissions and to produce the supporting documents. Therefore, there was no breach of natural justice by the adjudicator as contended by TNB (see paras 61–62).

(6) The critical part in the AD showed that, to the adjudicator, any communication or documents between the parties concerning the unrelated invoice should be conveyed before the issuance of the final account. It could thus be deduced that the adjudicator did not consider the consultant's notification as it was issued well after the date of the final account. In the context of an application under s 15(b) of the CIPAA, the court could not set aside the AD merely because relevant evidence had been excluded wrongly by the adjudicator or he had failed to attach weight to the relevant documentary evidence (see paras 70–71).

(7) TNB had not established there were clear and unequivocal errors in the AD to justify an order to stay the AD until the final determination of the subject matter of the AD in the arbitration proceedings. There was no solid footing for the stay application, and it must be dismissed (see paras 73 & 75).

(8) It necessarily followed from the dismissal of the setting aside application and the stay application that the enforcement application must be allowed (see para 76).

[Bahasa Malaysia summary

Tiga permohonan didengar bersama, iaitu oleh: (a) Tenaga Nasional Bhd ('TNB') menurut s 15(b) dan/atau (d) Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') dalam OS 183 untuk mengenepikan keputusan adjudikasi ('KA') ('permohonan mengenepikan'); (b) TNB menurut s 16 APAIP dalam OS 184 untuk menangguhkan KA sementara menunggu pelupusan permohonan untuk menangguhkan KA, permohonan

mengenepikan dan/atau penentuan muktamad perkara KA melalui timbang tara ('permohonan penangguhan'); dan (c) Malaysian Resources Corp Bhd ('MRCB') menurut s 28 APAIP dalam SP 186 untuk menguatkuasakan KA ('permohonan penguatkuasaan'). Prosiding adjudikasi timbul daripada satu surat penerimaan di mana MRCB dilantik oleh TNB sebagai kontraktor utama bagi satu projek. Kerja-kerja itu boleh dikatakan siap, dan akaun akhir telah dikeluarkan oleh TNB dalam jumlah RM43,919,533, tidak termasuk cukai barangan dan perkhidmatan. MRCB mempertikaikan akaun akhir dan mengeluarkan notis untuk mempertikaikan menurut klausa 30.10(b) syarat kontrak ('SK') dalam tempoh tiga bulan yang ditetapkan dari tarikh penerimaan akaun akhir. MRCB telah mengemukakan permohonan pembayaran interimnya kepada TNB untuk jumlah RM47,442,296.87. TNB kemudiannya mengeluarkan perakuan pembayaran, yang kemudiannya disemak, untuk menggambarkan angka seperti yang diperakui dalam akaun akhir. MRCB dimaklumkan bahawa perunding bagi projek itu telah memutuskan untuk mengekalkan keputusan mereka berhubung akaun akhir. MRCB kemudiannya mengeluarkan notis dan permintaan untuk timbang tara kepada TNB. MRCB mengeluarkan tuntutan bayaran kepada TNB untuk menuntut jumlah RM1,519,037.10 (tidak termasuk faedah) untuk: (i) kurang perakuan bagi kerja-kerja perubahan yang telah disiapkan menurut 25 arahan pengurusan projek ('APP'); dan (ii) peninggalan yang salah pada kerja-kerja variasi untuk APP 054 dalam jumlah RM211,971.22. TNB menyampaikan maklum balas pembayarannya kepada MRCB dan MRCB menyampaikan notis adjudikasi kepada TNB. MRCB kemudiannya mengemukakan tuntutan adjudikasinya dan selepas itu, TNB mengemukakan jawapan adjudikasinya. TNB kemudiannya mengemukakan rejoinder dan sebagai jawapan kepada perkara yang sama, MRCB mengemukakan surrejoinder. Adjudikator memutuskan dalam AD bahawa TNB membayar MRCB sejumlah RM91,072.63. Oleh itu, permohonan-permohonan ini.

Diputuskan, menolak permohonan mengetepikan dan permohonan penangguhan; dan membenarkan permohonan penguatkuasaan:

(1) Adjudikator mendedikasikan Bahagian N dalam AD mengenai 'Cabaran Bidang Kuasa' dengan memetik bantahan awal TNB terhadap tuntutan adjudikasi dan jawapan MRCB sebelum menyatakan bahawa beliau sedang meneruskan di bawah s 27(3) APAIP untuk melengkapkan proses adjudikasi. TNB tidak membuktikan alasan pertama dalam percubaannya untuk mengetepikan KA (lihat perenggan 23–24).

(2) Penelitian terhadap tuntutan pembayaran, termasuk 'Butiran Tuntutan', mendedahkan bahawa maklumat dan butiran yang mencukupi telah disediakan untuk membolehkan TNB mengetahui kausa tindakan MRCB kerana ini mengandungi asas tuntutan, pecahan jumlah yang dituntut, tarikh akhir pembayaran dan peruntukan kontrak yang berkaitan. TNB telah ditaksir secukupnya mengenai kes MRCB.

Memandangkan MRCB telah mematuhi keperluan yang diperlukan di bawah s 5(2) APAIP, adjudikator telah memakai bidang kuasa yang diperlukan untuk membuat keputusan atas alasan tuntutan yang dikemukakan oleh MRCB dalam prosiding adjudikasi (lihat perenggan 28–30).

(3) Walaupun adalah benar bahawa, dalam adjudikasi, MRCB mengambil pendirian bahawa ia berhak mendapat jumlah yang lebih tinggi iaitu RM231,584 berhubung dengan APP 077, RM102,318.75 berhubung dengan APP 107 dan RM20,022.80 berhubung dengan APP 129 yang diperoleh daripada kadar dan kuantiti dan keadaan tertentu seperti yang dikemukakan oleh MRCB dalam cadangan kosnya, adjudikator telah mempertimbangkan penghujahan dan keterangan dokumentari pihak-pihak sebelum beliau memutuskan untuk bergantung pada penilaian yang disyorkan dan bukannya akaun akhir dalam tiba di jumlah adjudikasi. Kritikan TNB adalah kepada kaedah adjudikator dalam mencapai penemuan dan kesimpulannya yang tidak sama dengan penafian hak untuk didengar atau keadilan prosedur. Walaupun jika adjudikator menggunakan pendekatan yang salah dengan tidak, antara lain, menilai sama ada kadar dan justifikasi yang dicadangkan MRCB adalah munasabah, ini tidak menjamin pengenepian KA di bawah s 15(b) APAIP. TNB telah gagal membuktikan bahawa adjudikator melakukan dapatan sendiri dan bertindak melanggar peraturan keadilan semulajadi dalam memutuskan tuntutan MRCB berkenaan APP 077, APP 107 dan APP 129 (lihat perenggan 39, 45 & 47–48).

(4) Adjudikator telah merujuk, antara lain, peruntukan dalam SK, APP, notis tuntutan MRCB, lembaran hamparan dan cadangan kos asal dan disemak; minit mesyuarat; surat-menyurat; penilaian yang disyorkan dan akaun akhir dalam menilai kedudukan pihak masing-masing dan mencapai keputusannya. Terdapat sebab yang mencukupi untuk menunjukkan proses pemikiran adjudikator apabila beliau akhirnya menganugerahkan tuntutan MRCB untuk APP 077, APP 107 dan APP 129 (lihat perenggan 50–51).

(5) Seksyen 25 APAIP memberikan kuasa yang luas kepada seorang adjudikator, salah satunya dalam perenggan (d) adalah untuk menggunakan pengetahuan dan kepakarannya sendiri dalam industri pembinaan. Pengeluaran laporan tidak mengikut spesifikasi atau sebarang bentuk dokumentasi untuk kerja-kerja yang tidak memenuhi spesifikasi adalah amalan biasa dalam industri pembinaan. Ia berada dalam kuasa adjudikator untuk mempertimbangkan amalan ini dan dia tidak boleh dipersalahkan sebagai telah melakukan dapatan sendiri. Pihak-pihak diberi peluang yang luas untuk membuat penghujahan dan mengemukakan dokumen sokongan. Oleh itu, tiada perlanggaran

keadilan semula jadi oleh adjudikator seperti yang dipertikaikan oleh TNB (lihat perenggan 61–62).

(6) Bahagian kritikal dalam KA menunjukkan bahawa, kepada adjudikator, apa-apa komunikasi atau dokumen antara pihak berkenaan invois yang tidak berkaitan hendaklah disampaikan sebelum pengeluaran akaun akhir. Oleh itu, boleh disimpulkan bahawa adjudikator tidak mempertimbangkan pemberitahuan perunding kerana ia dikeluarkan selepas tarikh akaun akhir. Dalam konteks permohonan di bawah s 15(b) APAIP, mahkamah tidak boleh mengenepikan KA semata-mata kerana keterangan yang berkaitan telah dikecualikan secara salah oleh adjudikator atau beliau telah gagal untuk menimbang keterangan dokumentari yang berkaitan (lihat perenggan 70–1).

(7) TNB tidak membuktikan terdapat kesilapan yang nyata dan jelas dalam KA untuk mewajarkan perintah untuk menangguhkan KA sehingga penentuan muktamad perkara KA dalam prosiding timbang tara. Tiada asas kukuh untuk permohonan penangguhan, dan ia mesti ditolak (lihat perenggan 73 & 75).

(8) Ia seharusnya diikuti daripada penolakan permohonan mengenepikan dan permohonan penangguhan bahawa permohonan penguatkuasaan harus dibenarkan (lihat perenggan 76).]

Cases referred to

Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC), QBD (refd)
Globalcon Holding (M) Sdn Bhd v DMC Builder Sdn Bhd [2020] MLJU 1644, HC (refd)
JKP Sdn Bhd v Anas Construction Sdn Bhd and another appeal [2022] 6 MLJ 503, CA (refd)
Naza Engineering & Construction Sdn Bhd v SSL Dev Sdn Bhd [2020] 9 MLJ 499; [2020] 2 MLRH 436, HC (refd)
Sime Darby Property (Bukit Raja) Sdn Bhd v Alaf Pentawaris Sdn Bhd [2020] MLJU 1554, HC
Syarikat Bina Darul Aman Berhad & Anor v Government of Malaysia [2017] MLJU 673; [2018] 4 CLJ 248, HC (refd)
Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case [2017] MLJU 242, HC (refd)
Zeta Letrik Sdn Bhd v JAKS Island Circle Sdn Bhd and other cases [2022] MLJU 2734, HC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 5, 5(2), 12(2), (3), (4), 15, 15(b), (d), 16, 25, 25(m), 27(3), 28, 37(1)

Mohanadass Kanagasabai (with Kalashini Sandrasegaran and Thomas Shaun

Mathews) (Mohanadass Partnership) in Originating Summons Nos WA-24C-183–09 of 2022 and WA-24C-184–09 of 2022 for the plaintiff.

Sajitha Suresh (with Suria Juan) (Selva Mookiah & Assoc) in Originating Summons No WA-24C-186–09 of 2022 for the plaintiff.

Sajitha Suresh (with Suria Juan) (Selva Mookiah & Assoc) in Originating Summons Nos WA-24C-183–09 of 2022 and WA-24C-184–09 of 2022 for the defendant.

Mohanadass Kanagasabai (with Kalashini Sandrasegaran and Thomas Shaun Mathews) (Mohanadass Partnership) in Originating Summons No WA-24C-186–09 of 2022 for the defendant.

Aliza Sulaiman J:

INTRODUCTION

[1] These are the grounds of judgment in respect of CIPAA five as referred to in the grounds of judgment for Originating Summons Nos WA-24C-165–08 of 2022 ('OS No 165'), WA-24C-166–08 of 2022 ('OS No 166') and WA-24C-167–08 of 2022 ('OS No 167') between the same parties ('GOJ CIPAA 1').

[2] Specifically, the applications which were heard together as agreed by the parties are as follows:

(a) the application by Tenaga Nasional Bhd ('TNB') pursuant to s 15(b) and/ or (d) of the Construction Industry Payment and Adjudication Act 2012 (Act 746) ('the CIPAA') in OS No WA-24C-183–09 of 2022 ('OS No 183') to set aside the adjudication decision dated 11 September 2022 ('AD') by the learned adjudicator, Mr Gainovry Amerinal Djafar bin Mohd Ishak ('setting aside application');

(b) the application by TNB pursuant to s 16 of the CIPAA in OS No WA-24C-184–09 of 2022 ('OS No 184') to stay the AD pending the disposal of the application to stay the AD, the setting aside application and/or the final determination of the subject matter of the AD by way of arbitration ('stay application'); and

(c) the application by MRCB pursuant to s 28 of the CIPAA in OS No WA-24C-186–09 of 2022 ('OS No 186') to enforce the AD ('enforcement application').

[3] The outcome of the instant applications is the same as in GOJ CIPAA 1, namely the setting aside application and the stay application were dismissed, and the enforcement application was allowed.

[4] I now provide my detailed reasons for the decision.

THE CAUSE PAPERS

[5] The cause papers for each application are as follows:

(a) OS No 183 — setting aside application:

(i) TNB's OS dated 23 September 2022 (encl 1);

(ii) TNB's AIS affirmed by its Manager (contract and asset dispute), Nyanavellan Pillay a/l Maniam on 23 September 2022 (encls 2–16);

(iii) TNB's corrective affidavit affirmed by the same deponent on 19 October 2022 (encl 18);

(iv) MRCB's AIR affirmed by its Group Chief Operating Officer, Kwan Joon Hoe on 21 October 2022 (encl 19); and

(v) TNB's AIR affirmed by the same deponent on 2 December 2022 (encl 20).

(b) OS No 184 — stay application:

(i) TNB's OS dated 23 September 2022 (encl 1);

(ii) TNB's AIS affirmed by the same deponent on 23 September 2022 (encls 2–17);

(iii) TNB's corrective affidavit affirmed by the same deponent on 19 October 2022 (encl 19);

(iv) MRCB's AIR affirmed by the same deponent on 21 October 2022 (encl 20); and

(v) TNB's AIR affirmed by the same deponent on 2 December 2022 (encl 21).

(c) OS No 186 — enforcement application:

(i) MRCB's OS dated 30 September 2022 (encl 1);

(ii) MRCB's AIS affirmed by the same deponent on 30 September 2022 (encl 2);

(iii) TNB's AIR affirmed by the same deponent on 19 October 2022 (encl 3); and

(iv) MRCB's AIR affirmed by the same deponent on 1 November 2022 (encl 4).

A BACKGROUND FACTS

[6] Most of the facts as narrated in GOJ CIPAA 1 are applicable here. The adjudication proceedings arose from the same letter of acceptance dated 15 August 2017 ('LOA') wherein MRCB was appointed by TNB as the main contractor for the project known as 'TNB HQ Campus Development (Phase I) — The Construction And Completion Of Balai Islam and Staff Quarters At Part Of Lot 490 and Lot 6266, Jalan Bangsar, Kuala Lumpur For Tenaga Nasional Berhad' ('project').

[7] The works were practically completed on 31 July 2019 and the final account was issued by TNB on 26 March 2021 ('final account') in the sum of RM43,919,533, not inclusive of Goods and Services Tax.

[8] MRCB disputed the final account and issued a notice to dispute dated 30 April 2021 pursuant to cl 30.10(b) of the conditions of contract ('COC') within the stipulated time of three months from the date of receipt of the final account.

[9] On 15 June 2021, MRCB submitted its interim payment application No 41 ('IPA41') to TNB for the sum of RM47,442,296.87.

[10] TNB then issued the Certificate of Payment No 37 dated 9 July 2021, which was later revised on 12 August 2021 ('CP37'), based on IPA41 with adjustments to reflect the figures as certified in the final account.

[11] MRCB was informed on 16 July 2021 that the consultants for the project have decided to maintain their decision regarding the final account.

[12] MRCB then issued the notice and request for arbitration to TNB on 29 September 2021.

[13] On 25 March 2022, premised on the final account, IPA41 and CP37, MRCB issued a payment claim to TNB to claim the sum of RM1,519,037.10 (not inclusive of interest) for:

(a) under-certification of the variation works that have been completed pursuant to 25 project management instruction ('PMI'); and

(b) erroneous omission on the variation works for PMI No 054 in the sum of RM211,971.22,

(see the 'particulars of claim' in the payment claim and para 20 of MRCB's AIR, encl 19).

[14] On 8 April 2022, TNB served its payment response on MRCB.

[15] MRCB served the notice of adjudication to TNB pursuant to s 8 of the CIPAA on 14 April 2022.

[16] MRCB submitted its adjudication claim on 31 May 2022. Thereafter, TNB submitted its adjudication response dated 15 June 2022 and finally, MRCB submitted its adjudication reply dated 22 June 2022.

[17] On 5 July 2022, TNB submitted its rejoinder dated 5 July 2022 and in reply to the same, MRCB submitted its surrejoinder dated 13 July 2022.

[18] On 11 September 2022, the adjudicator determined in Part T of the AD that:

> 530. For the reasons set out above, I determine that:
>
> (i) The Respondent shall pay to the Claimant the sum of Ringgit Malaysia Ninety-One Thousand Seventy-Two and Sen Sixty-Three Only (RM91,072.63). This is hereby recorded as the 'Adjudicated Sum';
>
> (ii) The Adjudicated Sum shall be paid by the Respondent in full on or before fourteen (14) calendar days from receipt of this adjudication decision ('Due Date for Payment of the Adjudicated Sum') by way of cheque, bank transfer / telegraphic transfer or any other secured financial instrument; and
>
> (iii) The Respondent shall pay interest ('post-decision interest') at a rate of 5.0% per annum calculated as simple interest on the Adjudicated Sum from the Due Date for Payment of the Adjudicated Sum on any part of the Adjudicated Sum which remains unpaid until the same is paid in full.

[19] The adjudicated sum is made up of pre-decision interest in the sum of RM4,551.26 and five variation orders as tabulated in para 509 of the AD and re-produced below:

PMI No	VO No	Amount in final account / Payment Cert No (rev) (RM)	Adjudicated Amount (RM)	Variance (RM)
077	28	70, 416	95,328	24,912
092	31	39,162	89,264	50,102
107	41	175,632	183,509.57	7,877.57
113	44	10,000	11,900	1,900
129	63	16,387.20	18,117	1,729.80
			Total	86,521.37

A THE LEGAL PRINCIPLES

[20] The statutory provisions, case authorities and legal principles which are applicable in the setting aside application, stay application and enforcement application are the same as that in GOJ CIPAA 1 and shall not be repeated here.

B

OS No 183: The setting aside application

C **[21]** TNB's application to set aside the AD is premised on the same broad grounds as were dealt with in GOJ CIPAA 1, namely:

(a) the AD is null and void because the adjudicator lacks absolute jurisdiction to hear any, or all, matters as set out in the payment claim. Specifically, the adjudicator is not seized with jurisdiction under the CIPAA as the alleged claims do not form part of, or fall within, the parameters of the CIPAA or the subject matter of which CIPAA has conferred jurisdiction on the adjudicator; and

D

(b) if the court finds that the adjudicator is seized with jurisdiction, then, that the adjudicator had:

E

(i) acted in excess of jurisdiction pursuant to s 15(d) of the CIPAA as MRCB failed to comply with the mandatory requirements of sub-s 5(2) of the CIPAA; and/or

F

(ii) acted in a manner that is in breach of natural justice pursuant to s 15(b) of the CIPAA.

ANALYSIS AND DECISION OF THE COURT

G *First ground: Whether the AD is null and void because the adjudicator lacks absolute jurisdiction due to MRCB's alleged failure to comply with sub-s 37(1) of the CIPAA by commencing the adjudication 6 1/2 months after the reference to arbitration*

H **[22]** The parties' averments and submissions on the first ground are a repeat of the affirmations and submissions in respect of the first ground for the application under s 15 of the CIPAA in OS No 165.

I **[23]** The adjudicator dedicated Part N in the AD on 'Jurisdictional Challenges' by quoting TNB's preliminary objections to the adjudication claim (for the reason of absolute lack of jurisdiction and excess of jurisdiction, see paras 453–463 of the adjudication response) and MRCB's response (see paras 348–353 of the adjudication reply) before stating that he is proceeding

under sub-s 27(3) of the CIPAA to complete the adjudication process (see paras 49–51 of the AD).

[24] My analysis and findings in GOJ CIPAA 1 are applicable here, resulting in the conclusion that TNB has not established the first ground in its attempt to set aside the AD.

Second ground: Whether the adjudicator acted in excess of jurisdiction as MRCB failed to comply with sub-s 5(2) of the CIPAA

[25] Again, this ground is similar to the second ground for the application under s 15 of the CIPAA in OS No 165 whereby TNB alleged that MRCB failed to identify the cause of action including the provision in the construction contract to which payment relates in seeking the under-certification claims. Instead, MRCB merely listed the purported 'relevant' contract provisions in bulk with no application or particularisation and thereby causing ambiguity.

[26] TNB additionally submitted that MRCB failed to accurately reflect the description of the work or services to which the payment relates and merely listed the PMI without any context. It was contended that a reasonable person reviewing the payment claim would not be able to discern the cause of action and the lack of particularisation was prejudicial to TNB.

[27] At the outset, the issue as to whether MRCB has complied with the requirements of s 5 of the CIPAA must be answered within the four corners of the payment claim in Form 1 dated 25 March 2022, without any reference to MRCB's covering letter of even date ('covering letter') for the same reasons as explained in GOJ CIPAA 1, namely MRCB has chosen to use 'Form 1 Payment Claim' in Schedule I, Part B Procedure of the 'Asian International Arbitration Centre Rules & Procedure' and it has referred to the 'payment claim' as the document in Form 1 which was enclosed to the covering letter. Paragraphs 15 and 16 of the covering letter state that:

> 15. Therefore, we hereby issue this payment claim for the sum of *RM1,519,037.10 (exclusive of interest)* against you pursuant to *Section 5 CIPAA 2012*. The said payment claim with its relevant attachments is enclosed herein for your reference.
>
> 16. Take note that this payment claim is only confined to issues arising from the final account, Interim Payment Application No. 41 and the corresponding Certificate of Payment No. 37 (Revised) that are listed at paragraph 12 above and shall in no way prejudice our rights to refer further and other claims to adjudication.

[28] A perusal of the payment claim, including the 'particulars of claim', reveals that sufficient information and details were provided to enable TNB to know MRCB's cause of action as these contain the basis of the claims, the breakdown of the claimed amount, the due date of payment (ie 28 September

2021 being 45 days from the issuance of the interim payment certificate ('IPC') as per the Appendix to the COC at preliminary page 1/45) and the relevant contract provisions (namely, cll 11.0, 30, 30.1 and 30.10 of the COC).

[29] Although one of TNB's grounds in disputing MRCB's claims as stated in sub-para 6(1) of the payment response is that the premise of the alleged claims and amount claimed are not clear, nevertheless TNB was able to submit 452 paras in 94 pages of adjudication response, excluding the sections on 'Jurisdictional Challenge' and 'Conclusion'. In my considered view, TNB was sufficiently appraised of MRCB's case.

[30] As MRCB has complied with the necessary requirements under sub-s 5(2) of the CIPAA, the adjudicator is clothed with the necessary jurisdiction to decide on the grounds of claim as advanced by MRCB in the adjudication proceedings.

Third ground: Whether there is a denial of natural justice for the reasons as proffered by TNB

First issue: Whether the adjudicator proceeded on a frolic of his own in deciding on certain matters relating to PMI 077, PMI 107 and PMI 129 in MRCB's favour without providing TNB an opportunity to comment

[31] In relation to PMI 077, PMI 107 and PMI 129, TNB's grievance was basically that the adjudicator's findings are in contradiction with MRCB's case and contemporaneous documents, and no opportunity was afforded to TNB to address the adjudicator on the approach which he had eventually taken in arriving at his findings and conclusion on the matter. The deprivation of the chance to comment is said to have material impact to the findings in the AD.

[32] TNB referred specifically to paras 157–171, 302–318 and 489–508 of the AD in contending that the adjudicator proceeded on a frolic of his own to, amongst others:

(a) identify the valuation recommended at one time by TNB, through its QS, during discussions between the parties which were held pre-CP37 ('recommended valuation');

(b) hold TNB to the recommended valuation, which was neither final, finalised or agreed upon;

(c) identify the variance between the recommended valuation and the amount in CP37 and the final account; and

(d) award MRCB the identified variance in the AD, in MRCB's favour.

[33] MRCB's claims of under-certification, the recommended valuation and the amount as awarded by the adjudicator may be summarised as follows:

PMI No	Description	MRCB's claimed sum in cost proposals (RM) (A)	Recommended Valuation (B)	CP37 (RM) (C)	Disputed sum (RM) (A—C)	Adjudicated amount (RM)
077	Additional service vehicular access (grass pavers) near carpark podium	302,000	79,128	70,416	231,584	95,328 (variance 24,912)
107	Construction of keystone wall between car park podium and dispensary	277, 951.15	183, 509.57	175, 632.40	102, 318.75	183, 509.57 (variance 7,877.57)
129	Extension of ducting two nos of FJB30 from JC9C at Jalan Kilat and Jalan Faraday	36,410	18,117	16,387 .20	20, 022.80	18,117 (variance 1,729.90)

[34] For ease of reference, the relevant paragraphs in the adjudication papers and the AD are tabulated below:

PMI No	Adjudication Claim	Adjudication Response	Adjudication Reply	Rejoinder	Surrejoinder	AD
077	100–108	193–206	136–148			157–171
107	169–182	295–309	231–239	26–27	20–21	302–318
129	265–275	417–427	325–332			489–508

[35] It is notable that, before embarking on an examination of each of the disputed variation orders, the adjudicator had said in para 71 of the AD, inter alia, that:

...

> In these adjudication proceedings, from the reading of the documents before me, unless the dispute is on the quantity of Work Done, the term 'under-certification' as adopted by the Claimant is in my view misleading. The dispute between the Parties herein is mostly on the disagreement of the new rates for the variation works.
>
> It is also trite in the construction industry that before the final account is prepared, Parties would discuss to finalise the Variation Orders which usually centres around the scrutiny by the Owner's consultants of the new rates proposed by the Contractor. At this juncture, the Owner's consultants would consider which provision of the valuation of variations contract clauses is applicable ie whether (i) to apply contract rates or (ii) to derive new rates from the Contract rates or (iii) to agree on entirely new rates.

[36] I had drawn the learned counsels' attention to the above excerpt in the AD to which TNB submitted that it supports TNB's arguments on the adjudicator having gone on a frolic of his own. This is because, in s 8, paras 37–47 of the adjudication response, TNB raised the defence that:

(a) a majority of the PMIs have been discussed, negotiated and agreed between parties before the same was incorporated as part of the final account ('settled claims'). Hence, MRCB is not entitled to re-open the agreed position and claim the variance between the claimed amount and the amount certified in the final account ('first defence'); and

(b) for PMIs which are not agreed or form part of the settled claims, MRCB is not entitled to the sum claimed because TNB disputes, among others, the entitlement to the scope of work performed, rates applied by MRCB and the quantum. MRCB bears the burden to demonstrate its entitlement to each claimed amount pursuant to the terms of the contract as to liability and quantum, but it failed to discharge this burden ('second defence'; see s 11 in the adjudication response on 'quantum not established').

[37] It was further submitted that the first defence was accepted by the adjudicator as evident from the fact that he dismissed claims for payment in respect of 21 PMI on, among others, the basis that 'The Claimant is not entitled to resile from its agreed position and the Claimant is estopped from disputing the agreed amount ...' (see paras 104, 180 and 212 of the AD). However, the second defence was completely ignored and not considered by the adjudicator in respect of PMI 077, PMI 107 and PMI 129 albeit there was no prior agreement between the parties on the scope of work, quantities and rates.

[38] Ultimately, TNB asserted that the adjudicator did not ascertain the case as framed by MRCB and as responded by TNB ie whether there is under-certification and applying the decisions in *JKP Sdn Bhd v Anas*

Construction Sdn Bhd and another appeal [2022] 6 MLJ 503 (CA) and *Cantillon Ltd v Urvasco Ltd* [2008] EWHC 282 (TCC), the adjudicator had breached the rules of natural justice by deciding the case upon a factual or legal basis which has not been put forward by the parties.

[39] I have given due consideration to the parties' arguments and I find that, whilst it is true that, in the adjudication, MRCB took the position that it is entitled to the higher amounts of RM231,584 in relation to PMI 077, RM102,318.75 in relation to PMI 107 and RM20,022.80 in relation to PMI 129 as derived from specific rates and quantities and circumstances as put forth by MRCB in its costs proposals, the adjudicator had considered the parties' submissions and documentary evidence before he decided to rely on the recommended valuation instead of the final account in arriving at the adjudicated amount.

[40] Among MRCB's submissions on PMI 077, PMI 107 and PMI 129 in the adjudication claim is that '... the PMC, architect and QS have a contractual and/or legal obligation to act fairly and independently in assessing all claims and variation claims submitted by the claimant. However, the respondent and its consultants simply refused, neglected and/or failed to properly evaluate and certify the claimant's claims even though supporting documents and evidence to substantiate all claims were provided to the respondent and its consultant'. On TNB's part, references were made in the adjudication response to, among others, the final account to justify TNB's valuation of MRCB's claims.

[41] The adjudicator's analysis of MRCB's claim in respect of PMI 077 included the facts regarding the recommended valuation which was submitted by the QS on 15 October 2020 and MRCB's disagreement to the same; and the absence of any further correspondence after MRCB conveyed its disagreement on 11 January 2021 and before the issuance of the final account on 26 March 2021, and of any reason by TNB for resiling from the recommended valuation.

[42] The adjudicator examined the recommended valuation and presented his findings as tabulated at p 50 of the AD. Based on the adjudicator's review, the recommended valuation was maintained in relation to all items except for '... the adoption of the rate of RM130/m2 for the ... Sunway Paving Uni-Grass interlocking concrete paver inclusive of the grass inserts ...'. The adjudicator exercised his power under s 25(m) of the CIPAA to 'review and revise any certificate issued ... pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute' in revising the amount for PMI 077 from RM70,416 to RM95,328 in CP37.

[43] Similar analysis and exercise of power under s 25(m) of the CIPAA was

carried out by the adjudicator for MRCB's claims in relation to PMI 107 and PMI 129 whereby for the latter, the adjudicator had provided his comments in the spreadsheet prepared by MRCB showing the differences between MRCB's proposed price and the recommended valuation at p 107 of the AD.

[44] MRCB's original and revised cost proposals, the recommended valuation and the final account are all part of the documentary evidence which was submitted to the adjudicator. The adjudicator found that there is no reason as to why TNB, through its QS, resiled from the recommended valuation and opted for a lower sum in the final account. To the adjudicator, the recommended valuation forms a good basis for his decision. Hence, this shows that there was under-certification of MRCB's claim and this led to the adjudicator awarding MRCB the difference between the amount in the recommended valuation and the final account.

[45] TNB's criticism is to the adjudicator's method in arriving at his findings and conclusion which, in my opinion, is not tantamount to a denial of the right to be heard or to procedural fairness. The parties were given sufficient opportunity to present their respective arguments and out of 26 claims for variation works pursuant to the PMI, only five claims were allowed, that too not in full.

[46] As for TNB's contention that it should have been invited to comment on the adjudicator's inclination to rely on the recommended valuation before rendering his decision so that TNB could explain the differences in position between the recommended valuation and CP37 and why the valuation in the latter ought to be preferred over the former, the parties were already allowed to submit a rejoinder and surrejoinder. An adjudicator has a strict timeline within which he or she must deliver the decision, failing which the adjudication decision is void (see sub-ss 12(2) and (3) of the CIPAA). Moreover, as submitted by Ms Sajitha, no prejudice has been caused to TNB because the sums in the recommended valuation are part of TNB's own evaluation and was initially recommended by it via its QS.

[47] Even if the adjudicator adopted a wrong approach by not, among others, assessing whether MRCB's proposed rates and justifications are reasonable, this does not warrant a setting aside of the AD under s 15(b) of the CIPAA (see para 14 in *Naza Engineering & Construction Sdn Bhd v SSL Dev Sdn Bhd* [2020] 9 MLJ 499; [2020] 2 MLRH 436 at pp 442–445).

[48] In conclusion, the first issue is answered in the negative in that TNB has failed to establish that the adjudicator went on a frolic of his own and acted in breach of the rules of natural justice in in deciding MRCB's claims in respect of PMI 077, PMI 107 and PMI 129.

Second Issue: As an alternative to the submission in respect of the first issue, whether the adjudicator failed to provide any reason/ justification in seeking to hold TNB to the recommended valuation for PMI 077, PMI 107 and PMI 129

[49] TNB submitted, as an alternative argument to the first issue and with reference to the adjudicator's duty to provide reasons for the decision in sub-s 12(4) of the CIPAA, that the adjudicator acted in breach of the rules of natural justice when he failed to provide any justification in seeking to hold TNB to the recommended valuation for PMI 077, PMI 107 and PMI 129.

[50] In my view, there is no merit in this ground to set aside the AD. The adjudicator had referred to, among others, the provisions in the COC; the PMIs; MRCB's notices to claim, spreadsheet and original and revised cost proposals; minutes of meetings; correspondence; the recommended valuation and the final account in assessing the parties' respective positions and arriving at his decision (see the paragraphs in the AD as set out in [34] above). As stated previously, the recommended valuation forms part of TNB's valuation of MRCB's variation claims which justifies the adjudicator's reference to the same.

[51] Overall, I am satisfied that there is adequate reasoning to show the adjudicator's thought process when he finally awarded MRCB's claims for PMI 077, PMI 107 and PMI 129 as summarised in para 509 of the AD.

[52] The second issue is similarly answered in the negative.

Third issue: Whether the adjudicator proceeded on a frolic of his own in deciding on certain matters relating to PMI 092 in MRCB's favour without providing TNB an opportunity to comment

[53] MRCB averred that the variation order for polyurethane coating for staff quarters and ST4/ST5 rooftop had been completed pursuant to PMI 092 (see paras 109–111 of the adjudication claim). Thus, it claimed the sum of RM62,038 being the difference between the amount claimed of RM101,200 and the certified sum in CP37.

[54] TNB's contention in respect of PMI 092 is similar to the first issue namely, that the adjudicator did not decide on the issue whether hacking and cement screeding works were additional works or rectification works based on the submissions of the parties and instead, he went on a frolic of his own to decide as per paras 265–268 of the AD. On this basis, the adjudicator found the value of PMI 092 to be RM89,264 and awarded MRCB the sum of RM50,102. Further, no opportunity was given to TNB to address the adjudicator on this specific aspect.

[55] In the adjudication response (see paras 207–218), TNB stated, among others, that the main dispute revolves around whether there was hacking and the need to reconstruct screeding works before paint was applied and whether these activities can be categorised as rectification works as opposed to additional works.

[56] The adjudicator recognised that the dispute is whether the hacking and cement screeding works is part of the additional work as contended by MRCB or rectification works as alleged by TNB (see para 264 of the AD).

[57] The adjudicator referred to the minutes of meeting wherein MRCB's position was recorded as '… the original contract was only requested for cement render without the painting. This PMI was issued to add on the white color polyurethane paint by Nippon. Therefore, MRCB had to chip the surface until it becomes even and then screeding had to be laid on top of the roughen surfaces caused by the chipping process. All these processes are required prior to the application of polyurethane paint by Nippon in order to get their warranty …'. The meeting concluded with the parties' agreement to reduce the amount to RM95,000 subject to confirmation on the quantity and total area (see para 261 of the AD).

[58] The adjudicator observed in paras 262 and 263 of the AD that at the time of the 2020 VO meetings and when MRCB provided its justification for the claim, TNB never raised the issue that the screeding did not meet the contract specifications and thus required rectification. However, on 7 December 2020, the QS wrote to MRCB contending that the hacking and reconstruct of the topping screed was rectification work to the completed topping screed.

[59] The adjudicator ruled in MRCB's favour because no Non-Conformance Report ('NCR') or other document such as a site memo was produced by TNB to show that it had notified MRCB of non-compliance of screeding works at the location in question and neither was there any written instructions by the architect to rectify the screed works as required under cl 6.5 of the COC on 'Work not in accordance with the Contract' (see paras 265–267 of the AD).

[60] TNB insisted that MRCB's case at the adjudication was not on the basis of the absence of a NCR and TNB was not given the chance to address the adjudicator on this aspect whereby TNB could then explain the circumstances which would warrant the issuance of a NCR or instruction pursuant to cl 6.5 COC and why the non-issuance of the same in this case is irrelevant to the issue as to whether the screeding works were defective.

[61] However, I agree with MRCB's submission that s 25 of the CIPAA grants wide powers to an adjudicator, one of which in para (d) is to draw on his own knowledge and expertise of the construction industry. The issuance of a NCR or any form of documentation for works that do not meet the specifications is a trite practice in the construction industry. It is well within the adjudicator's powers to consider this practice and he should not be faulted as having acted on a frolic of his own (see *Syarikat Bina Darul Aman Berhad & Anor v Government of Malaysia* [2017] MLJU 673; [2018] 4 CLJ 248 at p 259 and *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case* [2017] MLJU 242 as referred to in *Sime Darby Property (Bukit Raja) Sdn Bhd v Alaf Pentawaris Sdn Bhd* [2020] MLJU 1554 at paras 20 and 21).

[62] The parties were given ample opportunities to make submissions and to produce the supporting documents. In the final analysis, the adjudicator was satisfied that the hacking and cement screeding works is part of the additional work as contended by MRCB. Therefore, there is no breach of natural justice by the adjudicator as contended by TNB.

Fourth issue: Whether the adjudicator failed to consider evidence/ arguments raised by TNB in relation to PMI 113

[63] MRCB claimed that it had completed the variation order for works in respect of the additional staircase ST12 riser gap cover pursuant to PMI 113. The original design by the consultants for the staircase was without any riser, however, TNB's senior management was purportedly concerned about the privacy of female visitors who used the staircase (see paras 202 and 203 of the adjudication claim).

[64] In defence of the claim, TNB asserted that, as part of, and following, the 2020 VO meetings, an agreement was reached in respect of PMI 113 in the sum of RM28,000. PMI 113 was thus categorised as agreed between the parties without any reservations or caveat valued at RM28,000. Subsequently, on 7 December 2021, the consultants referred to two invoices and conveyed to MRCB that the assessment is revised downwards to RM10,000 ('consultant's notification'; see paras 341 and 342 of the adjudication response).

[65] In para 401 of the AD, the adjudicator was of the view that since the parties had agreed to an amount of RM28,000, they should not resile from the negotiated position until fresh evidence is adduced. The adjudicator considered one aspect of TNB's argument regarding an unrelated invoice for the sum of RM14,000 which was adduced by MRCB in support of its claim ('unrelated invoice'), and he found that the impact of the unrelated invoice is

RM14,000 + 15% = RM16,100. Therefore, the agreed amount was rationalised/reduced from RM28,000 to RM11,900.

[66] However, TNB's grouse is that the adjudicator did not consider the consultant's notification which would have a material impact to the findings in the AD as the value of PMI 113 will be further reduced to RM10,000 as per the amount in CP37.

[67] What TNB failed to highlight to this court is that the adjudicator had perused the documents and he explicitly said so in para 399 of the AD as follows:

> Based upon the documents before me, I am unable to find any further exchange of communication and/or documents between the Parties beyond 07 December 2020 and up to the issuance of the final account by the Respondent (PMC) on 26.03.2021.
>
> Hence, I deem that the Claimant did not object to the assertion by the Respondent.

The adjudicator's finding on non-objection by MRCB is in relation to the unrelated invoice.

[68] Judging by the chronology of events as tabulated in para 57 of the AD, '2020 VO meeting' refers to a high-level meeting which took place on 7 July 2020 and this was followed by several VO meetings from 9 July 2020 to 3 November 2020 before the final account was issued on 26 March 2021.

[69] MRCB submitted that TNB was shifting its position because, on one hand it admits that there was an agreed sum of RM28,000 without reservation or caveat and on the other hand, TNB reduced the sum to RM10,000 at a much later date.

[70] In my view, the critical part in the AD is as quoted above because it shows that, to the adjudicator, any communication or documents between the parties concerning the unrelated invoice should be conveyed before the issuance of the final account. It can thus be deduced that the adjudicator did not consider the consultant's notification as it was issued well after the date of the final account.

[71] In the context of an application under s 15(b) of the CIPAA, the court cannot set aside the AD merely because relevant evidence has been excluded wrongly by the adjudicator or he has failed to attach weight to relevant documentary evidence (see *Naza Engineering Globalcon Holding (M) Sdn Bhd v DMC Builder Sdn Bhd* [2020] MLJU 1644 at para 37 and *Zeta Letrik Sdn*

Bhd v JAKS Island Circle Sdn Bhd and other cases [2022] MLJU 2734 at paras 46 and 47).

OS No 184: The stay application

[72] TNB's broad grounds to support the stay application, after having fulfilled the threshold requirements of having filed an application to set aside the AD under s 15 of the CIPAA and the subject matter of the AD is pending final determination by arbitration, are essentially the same as in OS No 166, namely that:

(a) the AD contains clear and unequivocal errors; and

(b) a stay of the AD is warranted to meet the justice of the case.

[73] TNB's argument that the AD contains clear and unequivocal errors is primarily premised on the first Issue and third issue under the third ground above, and akin to OS No 166, is now presented as mistakes in the adjudicator's findings and conclusions. Suffice for me to say that TNB has not established there are clear and unequivocal errors in the AD to justify an order to stay the AD until the final determination of the subject matter of the AD in the arbitration proceedings (see para 120 in GOJ CIPAA 1).

[74] As regards TNB's case for the AD to be stayed to meet the justice of the case, the grounds put forth here are the same as in OS No 166. Hence, my reasoning in para 124 in GOJ CIPAA 1 applies.

[75] The end result is that there is no solid footing for the stay application, and it must be dismissed.

OS No 186: The enforcement application

[76] As per the decision in respect of OS No 167 in GOJ CIPAA 1 (see para 126), it necessarily follows from the dismissal of the setting aside application and the stay application that the enforcement application must be allowed.

CONCLUSION

[77] Premised on the aforesaid reasons, the setting aside application and the stay application in OS No 183 and OS No 184 were dismissed with costs of RM8,000 and RM3,500, respectively. The enforcement application in OS No 186 was allowed with costs of RM2,500. All orders made as to costs are subject to allocatur.

Setting aside application and stay application dismissed; and enforcement application allowed.

Reported by Nabilah Syahida Abdullah Salleh